No. 16-9493

IN THE

Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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November 29, 2017

PETITION FOR WRIT OF CERTIORARI FILED: JUNE 5, 2017
CERTIORARI GRANTED: SEPT. 28, 2017

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TABLE OF CONTENTS

Page

United States District Court for the Western District of Texas (Austin), *United States* v. *Lozano-Alcauter*, No. 1:15-cr-00297-SS, Relevant Docket Entries 1

United States Court of Appeals for the Fifth Circuit, *United States* v. *Florencio Rosales-Mireles*, No. 16-50151, Relevant Docket Entries 7

Indictment, *United States* v. *Robert Lozano-Alcauter aka: Florencio Rosales-Mireles*, No. 1:15-cr-00297-SS (W.D. Tex. Oct. 6, 2015) 10

Transcript, *United States* v. *Florencio Rosales-Mireles*, No. 1:15-cr-00297-SS (W.D. Tex. Feb. 16, 2016) 12

Judgment, *United States* v. *Robert Lozano-Alcauter aka: Florencio Rosales-Mireles*, No. 1:15-cr-00297-SS (W.D. Tex. Feb. 16, 2016) 22

Opinion, *United States* v. *Florencio Rosales-Mireles*, No. 16-50151 (5th Cir. Mar. 6, 2017) 32

Judgment, *United States* v. *Florencio Rosales-Mireles*, No. 16-50151 (5th Cir. Mar. 6, 2017) 39

Order List: 582 U.S. (Sept. 28, 2017), Excerpt 40

U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS (AUSTIN)

Criminal Docket For Case #: 1:15-cr-00297-SS-1

UNITED STATES OF AMERICA,

v.

LOZANO-ALCAUTER,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
09/24/2015	1	COMPLAINT Signed by State Judge Karen Sage as to Roberto Lozano-Alcauter (1). (jmw) [1:15-mj-00459-AWA] (Entered: 09/24/2015)
09/24/2015		Arrest of Roberto Lozano-Alcauter. (jmw) [1:15-mj-00459-AWA] (Entered: 09/24/2015)
		* * *
09/24/2015	4	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Roberto Lozano-Alcauter. David M.C. Peterson appointed. Signed by Judge Andrew W. Austin. (kkc) [1:15-mj-00459-AWA] (Entered: 09/24/2015)
		* * *
10/06/2015	9	INDICTMENT(Redacted Version) filed. Unredacted document sealed pursuant to E-Government Act of 2002 as to Roberto Lozano-Alcauter (1) count(s) 1. (td) (Entered: 10/06/2015)

DATE	NO.	DOCKET TEXT
		* * *
11/18/2015	17	Minute Entry for proceedings held before Judge Andrew W. Austin: Rearraignment held on 11/18/2015; Defendant Informed of Rights. Plea of guilty entered as to Roberto Lozano-Alcauter (1) Count 1; Referred to Probation for Presentence Report. True Name of Deft. Florencio Rosales-Mireles. (Minute entry documents are not available electronically.) (Court Reporter ERO.) (os) (Entered: 11/18/2015)
11/18/2015		True Name of Defendant as to Roberto Lozano-Alcauter. True name of defendant is: Florencio Rosales-Mireles. (os) (Entered: 11/18/2015)
11/18/2015	18	FINDINGS OF FACT AND RECOMMENDATION on felony guilty plea before the United States Magistrate Judge as to Florencio Rosales-Mireles. Signed by Judge Andrew W. Austin. (os) (Entered: 11/18/2015)
		* * *
11/19/2015	21	ORDER accepting re 18 Findings of Fact on Plea as to Florencio Rosales-Mireles. Guilty plea accepted.. Signed by Judge Sam Sparks. (os) (Entered: 11/19/2015)

DATE	NO.	DOCKET TEXT
01/14/2016	22	INITIAL PRESENTENCE REPORT as to Florencio Rosales-Mireles by Officer Shelley Flanary. Objections to the PSR must be submitted directly to the Probation Department. Instructions for viewing the report/worksheet are available here. (Document is available only to the attorney of record and AUSA for 10 days) (Attachments: # 1 Certificate of disclosure)(Frost, J.) (Entered: 01/14/2016)
		* * *
01/28/2016	24	ADDENDUM AND REVISED PRESENTENCE REPORT as to Florencio Rosales-Mireles by Officer Shelley Flanary. Instructions for viewing the report/worksheet are available here. (Document is available only to the attorney of record and AUSA for 10 days) (Attachments: # 1 Addendum) (Frost, J.) (Entered: 01/28/2016)
02/03/2016	25	SEALED PRESENTENCE INVESTIGATION REPORT Filed as to Florencio Rosales-Mireles by Officer Shelley Flanary. (Document available to court only) (Attachments: # (1 - 2)) (Frost, J.) (Entered: 02/03/2016)
02/10/2016	26	MOTION *for Non-Guidelines Sentence and Memorandum in Support* by Florencio Rosales-Mireles. (Attachments: # 1 Proposed Order, # 2 Exhibit Letters in Support)(Peterson, David) (Entered: 02/10/2016)

DATE	NO.	DOCKET TEXT
02/16/2016	27	Minute Entry for proceedings held before Judge Sam Sparks:Sentencing held on 2/16/2016 for Florencio Rosales-Mireles (1), Count(s) 1, Imprisonment 78 months, 3 years supervised release, $100.00 special assessment (non-reporting). (Minute entry documents are not available electronically.) (Court Reporter Lily Reznik.) (td) (Entered: 02/17/2016)
02/16/2016	28	SEALED PRESENTENCE INVESTIGATION REPORT placed under seal and available to the court only as to Florencio Rosales-Mireles. (td) (Entered: 02/17/2016)
02/16/2016	29	JUDGMENT AND COMMITMENT as to Florencio Rosales-Mireles. Signed by Judge Sam Sparks. (td) (Entered: 02/17/2016)
02/16/2016	30	Sealed Statement of Reasons as to Florencio Rosales-Mireles (SOR documents are not available electronically.) (td) (Entered: 02/17/2016)
		* * *
02/18/2016	33	NOTICE OF APPEAL following 32 Notice of Appeal (E-Filed) by Florencio Rosales-Mireles Per 5th Circuit rules, the appellant has 14 days, from the filing of the Notice of Appeal, to order the transcript. To order a transcript, the appellant should fill out Form DKT-13 (Tran-

DATE	NO.	DOCKET TEXT
		script Order) and follow the instructions set out on the form. If the appellant has a court appointed attorney under CJA, the Form CJA 24 should also be completed. Both forms are available in the Clerk's Office or by clicking the hyperlinks above. (td) (Entered: 02/18/2016)
		* * *
03/22/2016	36	TRANSCRIPT filed of Proceedings as to Florencio Rosales-Mireles held on February 16, 2016 Proceedings Transcribed: Sentencing. Court Reporter/Transcriber Lily I. Reznik, Telephone number 512-391-8792. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. Redaction Request due 4/12/2016, Redacted Transcript Deadline set for 4/22/2016, Release of Transcript Restriction set for 6/20/2016, Appeal

DATE	NO.	DOCKET TEXT
		Record due by 4/6/2016, (Reznik, Lily) (Entered: 03/22/2016)
		* * *
04/08/2016	40	Redacted Transcript filed re: 36 Transcript in case as to Florencio Rosales-Mireles (Reznik, Lily) (Entered: 04/08/2016)
		* * *
03/28/2017	43	JUDGMENT/MANDATE of USCA (certified copy) as to Florencio Rosales-Mireles. Affirming the District Court re: 32 Notice of Appeal (E-Filed).(td) (Entered: 03/28/2017)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Court of Appeals Docket #: 16-50151

UNITED STATES OF AMERICA,

v.

FLORENCIO ROSALES-MIRELES,

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
02/19/2016	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Florencio Rosales-Mireles [16-50151] (CAS)
	* * *
05/31/2016	APPELLANTS BRIEF FILED A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 06/06/2016 for Appellant Florencio Rosales-Mireles.. Appellee's Brief due on 07/05/2016 for Appellee United States of America [16-50151] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Mr. Florencio Rosales-Mireles. Date of service: 05/31/2016 via email - Attorney for Appellants: Davidson, Franco; Attorney for Appellee: Gay [16-50151] (Kristin L. Davidson)

DATE	DOCKET TEXT
	* * *
08/04/2016	APPELLEE'S BRIEF FILED E/Res's Brief deadline satisfied. Paper Copies of Brief due on 08/15/2016 for Appellee United States of America.. Reply Brief due on 08/22/2016 for Appellant Florencio Rosales-Mireles [16-50151] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLEE'S BRIEF FILED by USA. Date of service: 08/04/2016 via email - Attorney for Appellants: Davidson, Franco; Attorney for Appellees: Bhagat, Gay [16-50151] (Joseph H. Gay Jr.)
	* * *
08/29/2016	APPELLANT'S REPLY BRIEF FILED Reply Brief deadline satisfied. Paper Copies of Brief due on 09/06/2016 for Appellant Florencio Rosales-Mireles. [16-50151] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANTS REPLY BRIEF FILED by Mr. Florencio Rosales-Mireles. Date of service: 08/29/2016 via email - Attorney for Appellants: Davidson, Franco; Attorney for Appellees: Bhagat, Gay [16-50151] (Kristin L. Davidson)
	* * *

DATE	DOCKET TEXT
03/06/2017	PUBLISHED OPINION FILED. [16-50151 Affirmed] Judge: JES , Judge: EBC , Judge: LHS Mandate pull date is 03/27/2017 for Appellant Florencio Rosales-Mireles [16-50151] (JMA)
03/06/2017	JUDGMENT ENTERED AND FILED. [16-50151] (JMA)
03/28/2017	MANDATE ISSUED. Mandate pull date satisfied. [16-50151] (RSM)
06/12/2017	SUPREME COURT NOTICE that petition for writ of certiorari [8518793-2] was filed by Appellant Mr. Florencio Rosales-Mireles on 06/05/2017. Supreme Court Number: 16-9493. [16-50151] (CAV)
09/28/2017	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Florencio Rosales-Mireles in 16-50151 on 09/28/2017. [8605050-1] [16-50151] (CAV)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed: October 6, 2015]

Criminal No. A15CR0297SS

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERTO LOZANO-ALCAUTER
aka: FLORENCIO ROSALES-MIRELES,

Defendant.

INDICTMENT

[Violation: 8 U.S.C. § 1326
Illegal Re-entry into the United States.]

THE GRAND JURY CHARGES:

COUNT ONE
[8 U.S.C. § 1326]

On or about June 23, 2015, in the Western District of Texas, Defendant,

ROBERTO LOZANO-ALCAUTER
aka: FLORENCIO ROSALES-MIRELES,

an alien, was found in the United States, after having been denied admission, excluded, deported and removed therefrom on or about January 4, 2010, and the Defendant had not obtained consent to reapply for

admission from the Attorney General of the United States or his successor, the Secretary of Homeland Security; all in violation of Title 8, United States Code, Section 1326.

A TRUE BILL:

SIGNATURE REDACTED PURSUANT
TO E-GOVERNMENT ACT OF 2002

RICHARD L. DURBIN, JR.
UNITED STATES ATTORNEY

BY: /s/ Anthony W. Brown
Anthony W. Brown
Assistant U.S. Attorney

[1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Docket No. A 15-CR-297(1) SS

UNITED STATES OF AMERICA

vs.

FLORENCIO ROSALES-MIRELES

Austin, Texas
February 16, 2016

TRANSCRIPT OF SENTENCING BEFORE THE
HONORABLE SAM SPARKS

APPEARANCES:

For the United States:

Ms. Elizabeth Cottingham
Assistant U.S. Attorney
816 Congress Avenue, Suite 1000
Austin, Texas 78701

For the Defendant:

Mr. David M.C. Peterson
Assistant Federal Public Defender
Lavaca Plaza
504 Lavaca Street, Suite 960
Austin, Texas

Interpreter:

Mr. Peter Heide

Court Reporter:

Ms. Lily Iva Reznik, CRR, RMR
501 West 5th Street, Suite 4153
Austin, Texas 78701
(512) 391-8792

Proceedings reported by computerized stenography, transcript produced by computer.

[2] THE COURT: A 15-CR-297, *United States vs. Roberto Lozano-Alcauter*.

MS. COTTINGHAM: Elizabeth Cottingham for the United States.

MR. PETERSON: Good afternoon, your Honor.

David Peterson. And at the change of plea hearing, he had entered his true name as Florencio Rosales-Mireles. It's noted as such –

THE COURT: Yeah. It's A/K/A.

MR. PETERSON: Yes.

THE COURT: That's what happens when you have as many names as he has, many birth dates, false Social Security numbers, and whatnot.

Okay. If you'll tell me your full name and birth date.

THE DEFENDANT: Florencio Rosales-Mireles.

THE COURT: And your birth date?

THE DEFENDANT: xx-xx-64.

THE COURT: Mr. Rosales, have you had the opportunity to sit down with Mr. Peterson and review the presentence investigation made in your case?

THE DEFENDANT: Yes, sir.

THE COURT: The United States probation officer has calculated a sentencing guidelines for you of 77 to 96 months, with the information that you're 51 years of age. You're a Mexican citizen. You've been formally removed on one occasion [3] and apprehended on another. You've used multiple names, as illustrated by the fact the government doesn't even know your name when they indicted you. You have used at least two birth dates. You have five false Social Security numbers.

You came to us in federal custody on September 24, 2015, after being arrested at Travis County for assault/family violence, apparently the same day you went to the federal custody. You were convicted in 1999 of DWI, 2002 for assault, 2003 illegal entry, 2007 tampering with a government record and attempted fraudulent possession of an identification, 2009 aggravated assault with serious bodily injury where you stabbed a man multiply, an assault/family violence, and 2015 assault/family violence still with your wife, multiply.

So you've been assaulting Maria Perez since 2002. You have three other cases that were considered in the sentencing on those, and two other cases that were dismissed or otherwise disposed of.

You have advised the probation officer that you have good work record in landscaping and construction. There's no verification of that. I have no objections from the government. Only one objection and that is that in ten months, the guideline range of 2L.2 will – which has been proposed will be accepted, which would drop the guideline range from 41 to 51 months. I assume that's more of a 4A1.3 argument than it is –

MR. PETERSON: That's not an objection, your Honor. [4] That's just part of the motion for a non-guideline sentence.

THE COURT: And I have – that's it. So you can make your – I did get and review the motion for non-guideline sentence.

So, Mr. Rosales, before I sentence you, you have the right to say anything. I'll be glad to listen to anything that you would like to say.

THE DEFENDANT: My wife told me barely two weeks ago that I needed letters for my employment. But I ask you for mercy. For my children, my daughters, they're little. They're from – they're 19, 15, 14 years old.

THE INTERPRETER: Interpreter correction. Nine, 13, 14 years old.

THE COURT: Well, I've got them 14, 12, 11 and nine with two adult children.

THE DEFENDANT: Yes, sir.

The mercy I ask for is that I apologize – I'm sorry for what I've done. And my wife and I have plans now to go to Monterrey, where my mom is, my sister, my whole family. And I have work, once I get there, because my wife is diabetic and she cannot do hard work. And so, I need to work to be able to help my family.

THE COURT: Well, why do you beat her up every so often? You beat her up and were arrested for it because she had injuries in 2002 and 2009 and 2015. Every so often, you beat her [5] up where the police come and get you, like it did before you got to us.

THE DEFENDANT: I'm really sorry. I'm very remorseful for everything.

THE COURT: Okay.

THE DEFENDANT: What I want the most is not to come back here anymore to this wonderful country. My mom is also 80 years old and she's a little bit ill. I just want to go there to work and help my family.

MR. PETERSON: Judge, as I – well, I guess I'll start with the letters that were submitted along with the – my motion and memorandum. His family confirms that he is hard-working and supportive in that way, and has been, I think, for a long time. He is needed by his family, and he does take that type of responsibility and always has. I think you're right, that there's been these problems separated by about six, seven years each time.

Nonetheless, I think you and Ms. Cottingham and I have seen a lot of folks who end up with that level plus-16 in Criminal History Category VI. And Mr. Rosales has one single felony. Although it didn't result in a conviction until 2009, it's from 2001. So his only felony is 15 years old now. Now, in 2001, he didn't show up to court, but why in 2003 and 2007, they didn't bring him before the Court for this outstanding warrant, I don't know. But the fact remains the conduct from that plus-16 [6] offense is from 2001.

He's had – I looked back over it this morning – run-ins over the years. They have been separated by periods of years before this time in 2015. He had not been in any trouble since 2009, when he had finally been brought to – sentenced for that 2001 case. He's – I was pleasantly surprised by those letters that they're thinking – his family's thinking very specifically about how and what he will do in Mexico, rather than come

back, because that's the most notably perhaps for someone in his situation a grounds – kind of a commonsense grounds, but also one that's under 3553(a). He doesn't have a long series of deportations and apprehensions. He's been formally removed one –

THE COURT: He's got 13 criminal history points. That doesn't even take into consideration this alleged crime of violence 16.

MR. PETERSON: He does have that. He ended up in Criminal History Category VI through his own actions. If you count, though, it's two, four, and then, the seven, eight of those – no. Nine of those 13 points are from conduct that was in 2001 or 2002. Now, it's on him that he didn't end up in front of the Court until much later than that, but the vast bulk of that is significantly old and wouldn't have counted, to be fair, if he had just gone to court at the right time.

But a lot of his old conduct is catching up with him. [7] It's his first 1326, Judge. And you and I will have plenty of chance to talk about the commission and their new guidelines and all their proposals, but I think this is the type of thing where when a 15-year-old conviction is moving someone's range up so high – or a conviction for 15-year-old conduct is moving someone's range up so high, this is one of the cases where I think even the commission is acknowledging that the guidelines don't make it right. We're not asking for down to, you know, obviously time served, or even a year, or two years. But we are asking that you consider that 41 to 51 guideline range.

THE COURT: Well, the 2001, he didn't go, and so, at the same time, that same year that he had that was the second assault where he got six months.

MR. PETERSON: That's correct.

THE COURT: And then, of course, this last one, 200 days. So that was a serious one, too.

Okay. What says the government?

MS. COTTINGHAM: I think what's most disturbing to the government is when a defendant comes up here and uses his family saying that he wants mercy because of his family.

THE COURT: And his mother and his wonderful family.

MS. COTTINGHAM: And he's abused that very family. As the Court has already drawn attention to, he has four different assaults on his record. One in which he stabbed male individuals apparently. The other three in which he was beating up his wife. [8] Now, I can't think of something that's much more harmful to children than to see their own mother being beaten up by their father. I can't think of something that would be much more both emotionally and physically wrenching for a woman than being beaten up by her husband.

In the most recent assault, he apparently started beating up on his son first. So now, it's not just the mother but he's beating up on the son, and when the mother intervenes, his wife, he punches her three times with a closed fist in the face. I mean, that's his most recent conduct that we can look at to see whether someone has changed with him.

That's what causes me concern is when you do violence to other people and the fact that you would do violence to your own family is obviously especially harmful.

PROBATION OFFICER: Nothing.

THE COURT: Anybody wish to speak at this sentencing?

Mr. Rosales, Mr. Peterson, anything further?

MR. PETERSON: Nothing further, your Honor.

THE COURT: Florencio Rosales-Mireles, also known as Roberto Lozano-Alcauter, and other names, I sentence you to a term in the penitentiary of 78 months, followed by a three-year term of supervised release. I put the conditions of 18 United States Code 3583 on that supervised release, which means, as you know, Mr. Rosales, if you attempt to come back here illegally and are found here illegally, you can be sentenced in this case [9] again, as well as the next felony case of illegal reentry, and you'll receive double sentences.

So I hope your representations that you're not coming back and you're going to be in Monterrey are true. You don't do us any good to put you in jail. Certainly doesn't do your family any good, either.

I'll let the record reflect that under the consideration 4A1.3, when I look at the elements, I would have not sentenced Mr. Rosales to anything less than the 78 months after he's – his conduct in these cases and his conduct here today.

There will be no fine in the case, but I do impose the $100 assessment under the Victims of Crime Act, which you must pay or work off at his earliest opportunity.

I'm going to seal the presentence investigation. Nobody could come in and read about your conduct, Mr. Rosales, which is probably a blessing. And I'm giving you – in the event of any appeal, it becomes part of the record, and the government may use their

copies. And I will enter an order substantiating the reasons for the 78 months.

Primarily, it is when I consider the nature and the circumstance of the offense, this is the second time he's come to the courts for being here illegally. He's attempted to hide in the United States with multiple aliases, birth dates, Social Security numbers. His assaultive behavior, as counsel indicates, [10] at least dates from 2001 to 2015.

So the history and characteristics of the defendant are no better than the nature and circumstance of the offense. It's a serious offense, of course. And promote respect for the law, we're a country of laws. We must enforce our laws. And just punishment for his offense with his background, I think, is adequate. And hopefully this will keep Mr. Rosales from not returning to the United States to commit criminal conduct. And it's obvious he is a threat to the public by his assaultive conduct.

Anything further, counsel?

MR. PETERSON: No, your Honor.

THE COURT: I'll remand the defendant.

(End of proceedings.)

[11] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

I, LILY I. REZNIK, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 21st day of March, 2016

/s/ Lily I. Reznik

LILY I. REZNIK, CRR, RMR
Official Court Reporter
United States District Court
Austin Division
501 W. 5th Street, Suite 4153
Austin, Texas 78701
(512) 391-8792
Certification No. 4481
Expires: 12-31-16

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed: February 16, 2016]

Case Number: AU:15-CR-00297(1)-SS
USM Number: 31287-180

UNITED STATES OF AMERICA

v.

ROBERTO LOZANO-ALCAUTER a/k/a
FLORENCIO ROSALES-MIRELES
True Name: Florencio Rosales-Mireles,
Aliases: Emilio Moreno Ruiz, Florencio Mireles Rosales, Juan Antonio Najera, Roberto Alcauter-Lozano, Emilio Ruiz, Florencio Mireles, Florencio Rosales-Mireles, Florencio Rosales, Emilio Romero Ruiz, Florencio Rosales-Moreles, and Roberto Luis Elizondo

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, FLORENCIO ROSALES-MIRELES, was represented by David M.C. Peterson.

The defendant pled guilty to Count 1 of the Indictment on November 18, 2015. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2)	Illegal Re-Entry into the United States	06/23/2015	1

As pronounced on February 16, 2016, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 16th day of February, 2016.

/s/ Sam Sparks
SAM SPARKS
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **SEVENTY-EIGHT (78) MONTHS.**

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows: _____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

_____

By DEPUTY UNITED STATES MARSHAL

NON-REPORTING SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on non-reporting supervised release for a term of **THREE (3) YEARS.**

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

X If defendant is excluded, deported or removed upon release of probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not unlawfully possess a controlled substance.

3) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

4) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

6) The defendant shall cooperate in the collection of DNA as directed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

7) If convicted of a sexual offense and required to register under the Sex Offender and Registration Act,

that the defendant comply with the requirements of the Act.

8) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

9) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pays in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family obligations, and shall comply with the terms of any court order or order of an administrative process requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living.

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time, at home or elsewhere, and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications, and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sex offense as described in the Sex Offender Registration and Notification Act or has a prior conviction of a State or local offense that would

have been an offense as described in the Sex Offender Registration and Notification Act if a circumstance giving rise to federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of

the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) The defendant shall participate in a cognitive behavioral treatment program as directed by the probation officer, and if deemed necessary by the probation officer. Such program may include group sessions led by a counselor or participation in a program administered by the probation office. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

18) The defendant shall participate in workforce development programs and services as directed by the probation officer, and if deemed necessary by the probation officer, which include occupational/career development, including but not limited to assessment and testing, education, instruction, training classes, career guidance, job search and retention services until successfully discharged from the program. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

19) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

20) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pays such penalties in accordance with the Schedule of Payments sheet of the judgment.

21) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

22) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 501 West Fifth Street, Suite 1100, Austin, TX 78701. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTALS	$100.00	$.00	$.00

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of this sum shall begin immediately.

FINE

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3812(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: March 6, 2017]

No. 16-50151

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FLORENCIO ROSALES-MIRELES,
Also Known as Roberto Lozano-Alcauter,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Florencio Rosales-Mireles appeals his sentence for illegal reentry. He contends that the district court erred by counting one of his prior convictions twice when calculating the sentencing-guideline range. He also maintains that the sentence is substantively unreasonable. Finding no reversible error, we affirm.

I.

Rosales-Mireles pleaded guilty of illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(2). When calculating the criminal-history score, the probation officer counted a 2009 Texas conviction of misde-

meanor assault twice, assessing two criminal-history points each time it was counted. The total criminal-history score was calculated as 13, resulting in a criminal-history category of VI. Combined with Rosales-Mireles's offense level of 21, that criminal-history category yielded a guideline range of 77-96 months.

Rosales-Mireles did not object to the double-counting but did request a downward departure to 41 months. The district court denied the departure and sentenced Rosales-Mireles to 78 months of imprisonment and a three-year term of supervised release. Rosales-Mireles did not object to the sentence after it was imposed.

II.

Rosales-Mireles assigns error to the double-counting. He concedes that he did not make that objection in district court, so we apply the plain-error standard. *See United States v. Peltier*, 505 F.3d 389, 391 (5th Cir. 2007). To establish plain error, Rosales-Mireles must show (1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). "[I]f the above three prongs are satisfied, [we have] the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks and alterations omitted).

A.

The government concedes that the double-counting is error, and we agree. The sentencing guidelines provide that two criminal-history points be added "for *each* prior sentence of imprisonment of at least sixty days . . . ." U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 4A1.1 (emphasis added). By adding four

points based on the same conviction, the court erred. Moreover, "the error is clear from the language of the Guidelines."[1] Thus, Rosales-Mireles satisfies the first two prongs.

B.

To satisfy the third prong, Rosales-Mireles must show "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence."[2] "When a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 136 S. Ct. at 1345. But "[t]he Government remains free to point to parts of the record—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make." *Id.* at 1347 (quotation marks omitted and alteration adopted).

Had the district court not erred by double-counting Rosales-Mireles's misdemeanor-assault conviction, the guideline range would have been 70-87 months instead of 77-96 months as recommended in the presentence report. Nonetheless, the government contends that the court would have sentenced Rosales-Mireles to the same term of imprisonment even if it

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[1] *United States v. Espinoza*, 677 F.3d 730, 736 (5th Cir. 2012). *See also United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010), *abrogated on other grounds by Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) ("As our conclusion is reached by a straightforward application of the guidelines, the error was also plain.").

[2] *United States v. Martinez-Rodriguez*, 821 F.3d 659, 663-64 (5th Cir. 2016) (quoting *United States v. Pratt*, 728 F.3d 463, 481 (5th Cir. 2013) (citation omitted)).

had not erred by double-counting. The government notes that the district court stated that it "would have not sentenced [Rosales-Mireles] to anything less than the 78 months."

But that statement, in context, does not go quite so far as saying that the court would have sentenced Rosales-Mireles to 78 months regardless of the guideline recommendation. The full statement is this: "I'll let the record reflect that under the consideration 4A1.3, when I look at the elements, I would have not sentenced Mr. Rosales to anything less than the 78 months after he's—his conduct in these cases and his conduct here today."

The explanation was made in the context of denying a downward departure under U.S.S.G. § 4A1.3. Moreover, the denial was based, in part, on Rosales-Mireles's criminal history, and that history—because of the double-counting—erroneously included an extra conviction. Thus, we cannot say that the district court "explicitly and unequivocally indicate[d] that [it] would have imposed the same sentence . . . irrespective of the Guidelines range."[3] Rosales-Mireles has met his burden, under the third prong, to show a reasonable probability that he would have been subject to a different sentence but for the error.

C.

Even though Rosales-Mireles has satisfied the first three prongs, we must decide whether to exercise our discretion to remedy the error. We do so only where "the error seriously affect[s] the fairness, integrity or

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[3] *United States v. Miller*, 657 F. App'x 265, 270 (5th Cir. 2016) (per curiam). *See also United States v. Mudekunye*, 646 F.3d 281, 290 (5th Cir. 2011) (per curiam).

public reputation of judicial proceedings."[4] "The fourth prong . . . is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." *United States v. Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015).[5] Rather, "[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014) (quotation marks omitted).[6]

We decline to exercise our discretion in this case. We sometimes exercise discretion to correct a plain error where the imposed sentence is "materially or substantially above the properly calculated range." *United States v. John*, 597 F.3d 263, 289 (5th Cir. 2010).[7] But

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[4] *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *Puckett*, 556 U.S. at 135 (alteration in original)).

[5] *See also United States v. Wooley*, 740 F.3d 359, 369 (5th Cir. 2014) ("This circuit has repeatedly emphasized that even when we find that the first three factors have been established, this fourth factor is not automatically satisfied.") (quotation marks omitted); *United States v. Ellis*, 564 F.3d, 370, 378 (5th Cir. 2009) ("Not every error that increases a sentence need be corrected by a call upon plain error doctrine.").

[6] *Accord United States v. Mendoza-Velasquez*, 847 F.3d 209, 213 (5th Cir. 2017) (per curiam) (citing *United States v. Scott*, 821 F.3d 562, 571 (5th Cir. 2016)).

[7] *See, e.g.*, *John*, 597 F.3d at 285-86 (exercising discretion to correct a sentence 21 months outside the correct range); *United States v. Hernandez*, 690 F.3d 613, 621-22 (5th Cir. 2012) (exercising discretion to correct a sentence 12 months outside the correct range); *Mudekunye*, 646 F.3d at 290-91 (exercising discretion to correct a sentence 19 months outside the correct range).

we also have declined to use that discretion even where the discrepancy was huge.[8] Where the difference between the imposed sentence and the properly calculated range is small, we generally decline to correct the error.[9]

Here, there is *no* discrepancy between the sentence and the correctly calculated range. The court sentenced Rosales-Mireles to 78 months, which is in the middle of the proper range of 70-87 months. We cannot say that the error or resulting sentence would shock the conscience. Thus, we elect not to exercise our discretion.

III.

Rosales-Mireles contends that his sentence is substantively unreasonable because it is greater than necessary to effect the goals of 18 U.S.C. § 3553(a). Rosales-Mireles did not object to reasonableness in the district court, so we review only for plain error.[10]

A within-guidelines sentence is entitled to a presumption of reasonableness, and "[t]he presumption is

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[8] In *United States v. Wikkerink*, 841 F.3d 327, 337 (5th Cir. 2016), we declined relief under the fourth prong despite that the "correct sentence according to the Guidelines would have been 180 months [but] the district court ultimately imposed a sentence of 360 months."

[9] *See, e.g.*, *United States v. Avalos-Martinez*, 700 F.3d 148, 154 (5th Cir. 2012) (per curiam) (declining to exercise discretion where the imposed sentence exceeded the correct range by only one month); *United States v. Emanuel-Fuentes*, 639 F. App'x 974, 977 (5th Cir. 2015) (per curiam) (same).

[10] Rosales-Mireles notes that "[t]here is a circuit split as to whether a failure to object to the reasonableness of the sentence upon its imposition requires plain error review." He acknowledges that his argument is foreclosed, *see Peltier*, 505 F.3d at 391-92, and he raises it only to preserve it for further review.

rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). Rosales-Mireles's 78-month sentence is within-guidelines, as it is within the overlap of the correct (70-87 months) and incorrect (77-96 months) ranges. It is therefore presumed reasonable. *Id.*

Rosales-Mireles has not rebutted the presumption. He maintains that the district court placed too much weight on his old, prior convictions. But the court considered that argument during sentencing and rejected it. The court explicitly considered a number of the § 3553(a) factors, including the nature of the offense; Rosales-Mireles's history and characteristics; and the need to protect the public, deter future criminal conduct, and promote respect for the law. In addition, the court noted that this was Rosales-Mireles's second conviction for being in the United States illegally, that he had used multiple aliases to remain in the United States, and that he had a history of assault stretching from 2001 to 2015.

The district court was in the best position to evaluate Rosales-Mireles's history and characteristics and the need for the sentence to further the objectives in § 3553(a). *See Gall v. United States*, 552 U.S. 38, 51-52 (2007). Accordingly, the decision is entitled to deference. *Id.* Rosales-Mireles has not rebutted the presumption of reasonableness.

The judgment of sentence is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: March 6, 2017]

No. 16-50151
D.C. Docket No. 1:15-CR-297-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FLORENCIO ROSALES-MIRELES, also known as Roberto Lozano-Alcauter,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Austin

JUDGMENT

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the sentence imposed by the District Court is affirmed.

(ORDER LIST: 582 U.S.)

THURSDAY, SEPTEMBER 28, 2017

CERTIORARI GRANTED

* * *

16-9493 ROSALES-MIRELES, FLORENCIO V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted.